Tay Kiang Heong v Public Prosecutor and another appeal

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS D-09H-504–10 OF 2018 AND D-09H-505–10 OF 2018
ABDUL KARIM, VAZEER ALAM AND CHE MOHD RUZIMA JJCA
30 APRIL 2024

Criminal Procedure — Appeal — Appeal against conviction and sentence — Accused charged under s 354 of Penal Code — Assault or use of criminal force to a person with intent to outrage modesty — Accused convicted and sentenced to three years imprisonment — High Court affirmed conviction and reduced sentence to three months imprisonment together with fine of RM8,000, in default eight months imprisonment — Whether concurrent findings of trial judge and High Court judge on credibility of witnesses were correct — Whether sessions court wrongly convicted accused based on the charge which stated wrong date of the offence — - Whether High Court judge erred in rejecting accused's argument regarding absence of CCTV recording at shop where offence took place — Whether High Court erred in rejecting accused's argument regarding absence of full CRT recording — Whether sentence imposed by High Court manifestly low and inadequate — Penal Code s 354

The accused was charged with an offence of outraging the modesty of one Ms Yeap ('SP1') under s 354 of the Penal Code. The offence was committed by the accused at SP1's shop (in the store at the kitchen) and in support of the prosecution's case, the prosecution relied on the testimony of SP1's employee, one Nur Fazlin ('SP5'). At the end of the trial, the accused was convicted of the said charge and sentenced to three years imprisonment. On appeal, the High Court affirmed the conviction and allowed the appeal against sentence. The sentence was reduced to three months imprisonment together with a fine of RM8,000, in default eight months imprisonment. The accused had paid the fine and the imprisonment sentence was stayed by the court pending the present appeals by both parties. The first appeal was filed by the accused against both the conviction and sentence, whilst the second appeal was filed by the public prosecutor ('the cross-appeal') against the sentence imposed by the High Court. In these appeals, the accused challenged the concurrent findings of the trial judge and the High Court judge on the credibility of SP1 and SP5 as well as the findings that the prosecution had established a prima facie case. Further, the accused had also raised the similar issues that he had raised at the High Court as followed: (a) the issue regarding the date of the offence in the charge — according to the charge, the date of the offence was on 13 July 2015, whilst the prosecution's evidence showed that the offence was committed on 15 July 2015; (b) the absence of CCTV recording at the shop where the incident took place; and (c) the incomplete sessions court's CRT recording — this is in

relation to the request by the solicitors of the accused to be provided with the CRT recording of the proceedings in the sessions court but due to technical problems, only the CRT recording of the defence case was available.

Held:

(1) The issues raised before the present court were similar to those raised at the High Court. At the outset it was worth noting that both the sessions court and High Court made concurrent findings of fact, and it was well established principle that in such circumstance, an appellate court should be slow to disturb these findings unless it was shown that the evidence did not support such findings. In the present appeals, the court had noted that it had not been shown that the concurrent findings of fact by the courts below were unsupported by the evidence, direct or circumstantial. Of crucial importance to note in this regard was that the concurrent findings involved the question of the credibility of the witnesses, namely SP1 and SP5, and the court did not find any cogent reason to disagree with the trial judge's finding on the credibility of these two important witnesses. Their evidence was largely consistent and supported each other (see paras 43 & 46).

(2) The court did not find any merit in the issue regarding the date in the charge. The charge originally stated that the offence was committed on 13 July 2017, and this was subsequently amended to 15 July 2017 and the amended charge was then read and explained to the accused, and he pleaded not guilty, following which the trial continued. SP1 explained why she had stated the wrong date in her first police report and that explanation was accepted by the sessions court. The High Court judge also found the explanation to be plausible and reasonable. In any event, the accused was not prejudiced by this change in date, he did not deny being in SP1's shop on 15 July 2017. He also did not deny going into the kitchen side of the shop and into the store where SP1 was hiding. His defence was that though he was there, he did not indecently assault SP1 by caressing her breast and touching her buttocks, nor that he used criminal force on her (see para 47).

(3) The court did not find any error in the decision of the High Court in rejecting the argument by the accused regarding the non-production of the CCTV recording. The evidence of the investigating officer (SP6) was that the CCTV recorder was not functioning and as such there was no CCTV recording available to be produced in court. In any event, the production of the CCTV recording of the goings on in the shop front, even if it was available, was not going to help the accused as the offence was said to have been committed in the store at the kitchen, and not in front of any CCTV camera (see para 48).

(4) The issue regarding the incomplete CRT recording was also considered in depth by the learned High Court judge. The High Court judge was satisfied that there was a genuine technical fault resulting in the system not capturing and storing the audio-video data of the proceedings during the prosecution stage. Nevertheless, the High Court found the manual notes of proceedings recorded in long hand by the learned sessions court judge to be sufficient and in conformity with the requirements of the Criminal Procedure Code. In the circumstance, the court did not find any miscarriage of justice. The court agreed with the reasons given by the learned High Court judge that the failure of the CRT system to record the entire trial proceeding did not render the trial a nullity in order for a retrial to be ordered (see para 49).

(5) The court was in the overall satisfied that the High Court was right in affirming the decision of the sessions court to find the accused guilty of the offence charged. There was sufficient judicial appreciation of the evidence by the learned trial judge, and she had not misdirected herself either on the facts or on the law. Hence, the court found that the conviction was safe and accordingly dismissed the appeal against conviction (see para 50).

(6) As for the cross-appeal on sentence by the public prosecutor, the court was of the view that the sentence imposed by the High Court was manifestly low. Considering the seriousness of the offence and the impact on the victim, SP1, and further taking into consideration the sentencing trend for an offence under s 354 of the Penal Code, a sentence of three months' imprisonment was manifestly inadequate. The learned deputy public prosecutor argued for the sentence of three years imprisonment imposed by the sessions court to be reinstated. However, the court did not agree with that argument and was of the view that a more appropriate sentence would be imprisonment for a year whilst maintaining the fine of RM8,000 with eight months' imprisonment in default of payment. Hence, the court allowed the public prosecutor's cross-appeal and set aside the sentence of imprisonment of three months imposed by the High Court and substituted it with imprisonment of one year and affirmed the fine of RM8,000 in default eight months imprisonment (see para 51).

[Bahasa Malaysia summary

Tertuduh didakwa melakukan kesalahan mencabul kehormatan seorang Cik Yeap ('SP1') di bawah s 354 Kanun Keseksaan. Kesalahan tersebut dilakukan oleh tertuduh di kedai SP1 (di dalam stor di dapur) dan bagi menyokong kes pendakwaan, pihak pendakwaan bergantung kepada keterangan pekerja SP1, seorang Nur Fazlin ('SP5'). Pada akhir perbicaraan, tertuduh telah disabitkan dengan pertuduhan tersebut dan dijatuhi hukuman penjara tiga tahun. Semasa rayuan, Mahkamah Tinggi mengesahkan sabitan

tersebut dan membenarkan rayuan terhadap hukuman. Hukuman tersebut dikurangkan kepada tiga bulan penjara berserta denda RM8,000, jika ingkar, lapan bulan penjara. Tertuduh telah membayar denda tersebut dan hukuman penjara telah ditangguhkan oleh mahkamah sementara menunggu rayuan-rayuan semasa oleh kedua-dua pihak. Rayuan pertama difailkan oleh tertuduh terhadap sabitan dan hukuman, manakala rayuan kedua difailkan oleh pendakwa raya ('rayuan balas') terhadap hukuman yang dijatuhkan oleh Mahkamah Tinggi. Dalam rayuan-rayuan ini, tertuduh mencabar dapatan serentak hakim bicara dan hakim Mahkamah Tinggi mengenai kredibiliti SP1 dan SP5 serta dapatan bahawa pihak pendakwaan telah membuktikan kes prima facie. Selanjutnya, tertuduh juga telah membangkitkan isu-isu yang sama yang pernah dibangkitkannya di Mahkamah Tinggi seperti berikut: (a) isu mengenai tarikh kesalahan dalam pertuduhan — mengikut pertuduhan, tarikh kesalahan adalah pada 13 Julai 2015, manakala keterangan pihak pendakwaan menunjukkan bahawa kesalahan tersebut dilakukan pada 15 Julai 2015; (b) ketiadaan rakaman CCTV di kedai tempat kejadian tersebut berlaku; dan (c) rakaman CRT mahkamah sesyen yang tidak lengkap — ini adalah berhubung dengan permintaan peguam cara tertuduh untuk diberikan rakaman CRT prosiding di mahkamah sesyen tetapi disebabkan masalah teknikal, hanya rakaman CRT bagi kes pembelaan sahaja yang tersedia.

Diputuskan:

(1) Isu-isu yang dibangkitkan di mahkamah semasa adalah sama seperti yang dibangkitkan di Mahkamah Tinggi. Pada awalnya, adalah wajar diambil perhatian bahawa kedua-dua mahkamah sesyen dan Mahkamah Tinggi membuat dapatan-dapatan fakta serentak, dan adalah prinsip yang mantap bahawa dalam keadaan sedemikian, mahkamah rayuan harus perlahan untuk mengganggu dapatan-dapatan ini melainkan jika ditunjukkan bahawa keterangan yang ada tidak menyokong dapatan-dapatan sedemikian. Dalam rayuan-rayuan semasa, mahkamah mendapati bahawa tertuduh tidak menunjukkan bahawa dapatan-dapatan fakta serentak oleh mahkamah-mahkamah di bawah tidak disokong oleh keterangan, langsung atau mengikut keadaan. Perkara yang penting untuk diambil perhatian dalam hal ini ialah dapatan-dapatan serentak tersebut melibatkan soal kredibiliti saksi-saksi iaitu SP1 dan SP5, dan mahkamah tidak menemui apa-apa alasan yang kukuh untuk tidak bersetuju dengan keputusan hakim bicara mengenai kredibiliti kedua-dua saksi penting ini. Keterangan mereka sebahagian besarnya konsisten dan menyokong satu sama lain (lihat perenggan 43 & 46).

(2) Mahkamah tidak menemui apa-apa merit dalam isu berkenaan dengan tarikh pertuduhan. Pertuduhan pada asalnya menyatakan bahawa kesalahan tersebut dilakukan pada 13 Julai 2017, dan ini kemudiannya dipinda kepada 15 Julai 2017 dan pertuduhan pindaan kemudiannya

dibaca dan dijelaskan kepada tertuduh, dan dia mengaku tidak bersalah, berikutan itu, perbicaraan diteruskan. SP1 menjelaskan mengapa dia telah menyatakan tarikh yang salah dalam laporan polis pertamanya dan penjelasan tersebut diterima oleh mahkamah sesyen. Hakim Mahkamah Tinggi juga mendapati penjelasan tersebut adalah masuk akal dan munasabah. Walau apa pun, tertuduh tidak diprejudiskan dengan pertukaran tarikh ini, dia tidak menafikan berada di kedai SP1 pada 15 Julai 2017. Dia juga tidak menafikan masuk ke bahagian dapur kedai tersebut dan masuk ke dalam stor tempat SP1 bersembunyi. Pembelaannya ialah walaupun dia berada di sana, dia tidak menyerang SP1 secara tidak senonoh dengan membelai payudaranya dan menyentuh punggungnya, mahupun menggunakan kekerasan jenayah terhadapnya (lihat perenggan 47).

(3) Mahkamah tidak mendapati apa-apa kekhilafan dalam keputusan Mahkamah Tinggi yang menolak hujah tertuduh berhubung kegagalan mengemukakan rakaman CCTV. Keterangan pegawai penyiasat (SP6) ialah perakam CCTV tidak berfungsi dan oleh itu tiada rakaman CCTV tersedia untuk dikemukakan di mahkamah. Walau apa pun, pengemukaan rakaman CCTV kejadian di hadapan kedai, walaupun ia tersedia, tidak akan membantu tertuduh kerana kesalahan tersebut dikatakan telah dilakukan di stor di dapur, dan bukan di hadapan mana-mana kamera CCTV (lihat perenggan 48).

(4) Isu mengenai rakaman CRT yang tidak lengkap juga telah dipertimbangkan secara mendalam oleh hakim Mahkamah Tinggi yang bijaksana. Hakim Mahkamah Tinggi berpuas hati bahawa terdapat kesalahan teknikal yang tulen menyebabkan sistem tidak menangkap dan menyimpan data audio-video prosiding semasa peringkat pendakwaan. Namun begitu, Mahkamah Tinggi mendapati nota prosiding yang ditulis sendiri oleh hakim mahkamah sesyen yang bijaksana secara manual adalah mencukupi dan menepati kehendak Kanun Tatacara Jenayah. Dalam keadaan tersebut, mahkamah tidak menemui apa-apa salah laksana keadilan. Mahkamah bersetuju dengan alasan yang diberikan oleh hakim Mahkamah Tinggi yang bijaksana bahawa kegagalan sistem CRT untuk merekodkan keseluruhan prosiding perbicaraan tidak menyebabkan perbicaraan tersebut terbatal bagi membolehkan perbicaraan semula diperintahkan (lihat perenggan 49).

(5) Mahkamah secara keseluruhannya berpuas hati bahawa Mahkamah Tinggi adalah betul dalam mengesahkan keputusan mahkamah sesyen untuk mendapati tertuduh bersalah atas kesalahan yang dipertuduhkan. Terdapat penghayatan kehakiman yang mencukupi terhadap keterangan oleh hakim perbicaraan yang bijaksana, dan beliau tidak salah mengarahkan dirinya sama ada pada fakta atau undang-undang. Oleh

itu, mahkamah mendapati sabitan tersebut adalah selamat dan dengan itu menolak rayuan terhadap sabitan (lihat perenggan 50).

(6) Bagi rayuan balas terhadap hukuman oleh pendakwa raya, mahkamah berpendapat bahawa hukuman yang dijatuhkan oleh Mahkamah Tinggi adalah secara nyatanya rendah. Memandangkan keseriusan kesalahan tersebut dan kesannya terhadap mangsa, SP1, dan seterusnya mengambil kira trend hukuman bagi kesalahan di bawah s 354 Kanun Keseksaan, hukuman penjara tiga bulan adalah nyata tidak mencukupi. Timbalan pendakwa raya yang terpelajar berhujah supaya hukuman penjara tiga tahun yang dijatuhkan oleh mahkamah sesyen dikembalikan semula. Bagaimanapun, mahkamah tidak bersetuju dengan hujahan tersebut dan berpendapat hukuman yang lebih sesuai ialah penjara selama setahun sambil mengekalkan denda RM8,000 dengan lapan bulan penjara jika gagal membayar. Oleh itu, mahkamah membenarkan rayuan balas pendakwa raya dan mengenepikan hukuman penjara tiga bulan yang dijatuhkan oleh Mahkamah Tinggi dan menggantikannya dengan penjara setahun dan mengesahkan denda RM8,000, jika ingkar lapan bulan penjara (lihat perenggan 51).]

Cases referred to

Antonio Dias Caldeira v Frederick Augustus Gray [1936] 1 MLJ 110; [1934] 1 LNS 5, PC (refd)
PP v Datuk Hj Harun bin Hj Idris & Ors [1977] 1 MLJ 180 (refd)
PP v Munusamy [1979] 2 MLJ 286; [1980] 1 LNS 63, FC (refd)
Puganeswaran a/l Ganesan & Ors v PP and other appeals [2020] 12 MLJ 165, FC (refd)
Samar bt Mansor v Mustafa Kamarul Arifin [1974] 2 MLJ 71, FC (refd)

Legislation referred to

Criminal Procedure Code ss 266, 267
Evidence Act 1950 ss 8, 114(g)
Penal Code ss 254, 349, 350, 351, 354

Appeal from: Kelantan Criminal Appeal No 42S-16–3 of 2017 (High Court, Kota Bharu)

Lua Kok Hiong (with Cheah Poh Loon and Ummi Salhah bt Mohamad) (Lua & Mansor) for the appellant.
Dhiya Syazwani Izyan bt Mohd Akhir (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Vazeer Alam JCA (delivering judgment of the court):

INTRODUCTION

[1] There are two appeals before us emanating from a single judgment of the High Court in Kota Bharu, Kelantan. The first, Appeal No D-09(H)-504–10 of 2018, is by Tay Kiang Heong ('Tay') against his conviction and sentence and the second, Appeal No D-09(H)-505–10 of 2018, is by the public prosecutor against sentence.

[2] Tay was charged in the Kota Bharu Sessions Court with an offence of outraging the modesty of one Ms Yeap Woan Tyng ('Ms Yeap') and the charge read as follows:

> Bahawa kamu pada 15/07/2015, jam lebih kurang 9.30 malam di sebuah kedai beralamat Kedai Kek Cintaku, Cawangan Pasaraya KB Mall, Jalan Hamzah, dalam daerah Kota Bharu dalam negeri Kelantan telah menggunakan kekerasan kepada Yeap Woan Tyng, No K/P: 830306–03–5752, dengan niat untuk mencabul kehormatannya. Oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum dibawah Seksyen 354 Kanun Keseksaan.

[3] Tay was convicted of the charge by the trial court and sentenced to three years imprisonment from the date of sentencing on 22 February 2017. Tay appealed to the High Court against both conviction and sentence, whilst the public prosecutor cross-appealed against sentence.

[4] The High Court affirmed the conviction and allowed Tay's appeal against sentence. The sentence was reduced to three months imprisonment together with a fine of RM8,000 in default eight months imprisonment. Accordingly, the public prosecutor's cross-appeal was dismissed. This is the decision that is on appeal before us.

[5] Tay paid the fine and the sentence of imprisonment was stayed pending appeal to this court. Tay was on bail when he appeared before us.

OUR DECISION

[6] Having considered the appeal record and having heard and read the submissions of learned counsel for Tay as well as the learned deputy public prosecutor, we had delivered our decision and brief grounds in respect of both appeals as follows:

(a) in respect of Tay's appeal in Appeal No D-09(H)-504–10 of 2018, we dismissed the appeal in whole and affirmed the conviction; and

(b) in respect of the public prosecutor's cross-appeal in Appeal No D-09(H)-505–10 of 2018, we allowed the appeal in part by enhancing the sentence of imprisonment from three months to one year and affirming the sentence of RM8,000 fine in default eight months imprisonment.

These are the full grounds for our decision.

AT THE SESSIONS COURT

Prosecution's case

[7] The prosecution adduced the following evidence as part of its case:

(a) on 9 July 2015, the complainant, Ms Yeap, saw a Chinese man looking into her shop Kedai Kek Cintaku, KB Mall, Kota Bharu from outside the door and going back and forth in front of the store three to four times;

(b) on 10 July 2015, the same Chinese man, later identified as Tay, entered the shop and bought a cake and then asked Ms Yeap to accept the cake back while telling Ms Yeap that someone was interested in meeting her;

(c) on 11 July 2015, Tay gave a love letter to Ms Yeap and asked Ms Yeap to call a certain phone number;

(d) on 12 July 2015 Tay gave a card together with some 'Famous Amos' chocolates to Ms Tay;

(e) on 13 July 2015, out of curiosity Ms Yeap called the phone number that Tay gave and the recipient of the call, one Ah Kee, informed that he had never asked Tay to do what he did and that he did not know Tay and Ms Yeap;

(f) on 15 July 2015, Ms Yeap's employee at the shop one Ms Nur Fazlin ('SP5') saw Tay coming towards the shop and asked Ms Yeap to hide in the store room at the back because she was worried that Tay would disturb Ms Yeap;

(g) Ms Yeap then ran into the store room, but Tay nevertheless followed her by entering the store through the kitchen door;

(h) when Tay opened the store room door, Ms Yeap was shocked and tried to run out of the store room;

(i) Tay held both Ms Yeap's hands and she tried to get her right hand released. Then, Tay's right hand grabbed Ms Yeap's buttocks and at this point Ms Yeap yelled at Tay to let go. Tay refused to let go and merely smiled. While Ms Yeap tried to release his hand, Tay hugged her from behind and with his right hand caressed Ms Yeap's breast. She felt scared

and screamed but was ignored by Tay. SP5 heard Ms Yeap's screaming and rushed into the kitchen. In the kitchen, SP5 saw Ms Yeap and Tay, and Ms Yeap was in a state of fear. SP5 saw Tay holding Ms Yeap's hand and when he saw SP5 Tay let go of Ms Yeap's. Tay then went out of the shop smiling;

(j) after that SP5 asked Ms Yeap about what had happened, but Ms Yeap was at first silent and only after a while did she tell SP5 that Tay had grabbed her buttocks and breast;

(k) Ms Yeap made a police report on 16 July 2015 ('P4') in the presence of SP5. In that report Ms Yeap did not mention that Tay had held her buttocks and breast as she felt ashamed, confused and traumatised to talk about the incident in detail and only mentioned Tay's general disturbances. Ms Yeap had also mistakenly stated in P4 that the incident happened on 13 July 2015, when it actually happened on 15 July 2015. When Ms Yeap remembered the actual date of the incident 15 July 2015, Ms Yeap went back to the police station on 16 July 2015 and made a second police report ('P5') to correct that mistake and make a more detailed report of the incident. Ms Yeap also informed that her father ran into Tay and asked him not to bother Ms Yeap but Tay instead asked for money if he was to no longer bother Ms Yeap;

(l) SP5 confirmed that Tay once bought a cake from the shop and returned it to Ms Yeap, and on another occasion he came to the shop and gave chocolates to Ms Yeap. SP5 also said that after the incident on 15 July 2015, Tay came to the shop and threatened to set fire to the shop; and

(m) the investigating officer ('SP6') found from her investigation that though there was a CCTV recorder inside the shop, it was not in working order on the day of the incident. SP6's investigation also found that Tay had met Ms Yeap's father to settle the matter and offered to pay compensation but Ms Yeap's father did not agree. When SP6 met Ms Yeap on 2 September 2015, she was still affected by the incident.

Findings of the sessions court at close of prosecution case

[8] Section 354 of the Penal Code reads:

> Assault or use of criminal force to a person with intent to outrage modesty
>
> Whoever assaults or uses criminal force to any person, intending to outrage or knowing it to be likely that he will thereby outrage the modesty of that person, shall be punished with imprisonment for a term which may extend to ten years or with fine or with whipping or with any two of such punishments.

[9] The learned sessions judge held that in order to establish a prima facie case for a charge under s 354 of the Penal Code, the prosecution would have to

establish the following elements of the offence:

(a) there must have been assault or use of criminal force on a person; and

(b) such assault or use of criminal force must have been made:

(i) with intention to outrage modesty; or

(ii) with knowledge that the person's modesty was likely to be outraged.

[10] Therefore, in this case, it must be proven that:

(a) Tay assaulted or used criminal force on Ms Yeap, the victim; and

(b) that he intended thereby to outrage the victim's modesty; or

(c) that he knew it to be likely that he would thereby outrage victim's modesty.

[11] In respect of the first element, ie that Tay assaulted Ms Yeap or used criminal force on her, the learned sessions judge found that from the evidence of Ms Yeap, and her employee Ms Nur Fazlin ('SP5'), there was sufficient credible evidence showing that Tay held Ms Yeap's hand, hugged and held her buttocks and breast. Further, SP5 testified that she saw Tay enter the kitchen and then heard the complainant shouting from the kitchen. SP5 then entered the kitchen and she saw Tay holding Ms Yeap's hand and she could see palpable fear in Ms Yeap's face. She then saw Tay let go of Ms Yeap's hand and rush out of the kitchen. Thus, the learned sessions court judge found that Tay's actions of holding the complainant's hand, hugging the complainant, holding the complainant's breast and buttocks against Ms Yeap's will fulfilled the first element of the charge.

[12] As for the second element, ie that such assault or use of criminal force must have been made with intention to outrage modesty; or with knowledge that the person's modesty was likely to be outraged, the learned trial judge found that Tay had indeed used criminal force on Ms Yeap with the intention to violate the honour of the victim or knowing that such an act will violate the victim's self-respect, or at the very least Tay ought to have known that his action would result in Ms Yeap's dignity being outraged. The learned trial judge referred to the definition of force in s 349, criminal force in s 350 and assault in s 351 of the Penal Code.

[13] Based on the established facts, the learned sessions judge found that Tay's conduct in holding the complainant's hand, hugging and holding her breast as well as her buttocks had clearly violated the victim's dignity. The evidence also clearly showed that Ms Yeap was uncomfortable with the conduct of Tay and she was in fear of him. Clearly what Tay did was against her will.

[14] As to the element of intention, the learned sessions judge correctly observed that it is a matter that can be elicited through evidence according to the facts and circumstances of the incident itself. The learned trial judge was of the opinion that Tay's act of going to Ms Yeap's shop at KB Mall and entering the store room of the shop and stopping the complainant from dashing out by holding her hand and buttocks, refusing to let go of the complainant when she shouted, and then hugging and holding her breast was sufficient to give rise to a reasonable inference that Tay indeed had the intention of violating the victim's dignity.

[15] The learned sessions judge further considered the demeanour of Ms Yeap during examination, cross-examination and also re-examination, and found it to be consistent. Thus, the trial judge accepted Ms Yeap's evidence as credible. Further, there were no elements of lying by the complainant or any of the other material prosecution witnesses, and in particular SP5. The learned sessions judge concluded that there was no reason for Ms Yeap to fabricate this humiliating story that lowers her own dignity.

[16] The learned sessions judge also dealt with the issue of corroboration and found that Ms Yeap's testimony was corroborated by that of SP5. In fact Ms Yeap had informed SP5 that Tay hugged and held her against her wish. Further, the investigating officer ('SP6') testified that at the meeting with Ms Yeap on 2 September 2015, she was still very sad and affected by the incident. Hence, the learned trial judge concluded that Ms Yeap was still traumatised even though the incident happened more than a month ago. Therefore, the learned trial judge concluded that Ms Yeap's uncheerful mood and behavior even after more than a month showed that SP1's evidence has been supported by SP1's post-incident conduct and behavior as well as the surrounding circumstances.

[17] On the issue of the absence of a medical report, the learned sessions judge held that the absence of any medical report on Ms Tay was not fatal to the prosecution's case, especially when there was ample corroboration of Ms Yeap's testimony. The corroboration between SP1, SP5 and SP6 is consistent and supports each other.

[18] The defence argued that adverse inference under s 114(g) of the Evidence Act 1950 ought to be invoked against the prosecution for the non-production of the CCTV recording. The defence contended that if the CCTV footage was tendered in evidence, it would have assisted the defence. However, the fact of the matter was that there was no CCTV recording that was obtained by the investigating officer (SP6). SP6 testified that the investigations revealed that the CCTV recorder was not in working order at the time of the incident and as such there was no CCTV recording. Ms Yeap and her father

had informed SP6 that the CCTV recorder had not been working for several days and that Ms Tay had asked the contractor to repair it but it had not been repaired when the incident took place. Hence, in the absence of the recording, it cannot be said that there was suppression of evidence by the prosecution and no adverse inference under s 114(g) of the Evidence Act can be invoked.

[19] The learned trial judge further considered the issue of contradictions or discrepancies in the prosecution's case raised by the defence. There were two dates of the incident given by the complainant ('SP1') namely 13 July 2015 in the first police report ('P4') and 15 July 2015 through the complainant's oral testimony in this court. The learned sessions judge was of the view that the discrepancies in the date of the event are not material. The learned trial judge accepted the complainant's explanation for this discrepancy. The complainant explained that she tried hard to forget the incident and did not want to remember it anymore. The complainant also said the first police report (P4) was made out of fear and shame, and since she was accompanied by Nur Fazlin (SP5) when the first report was made, she was very embarrassed to narrate the incident in detail. Therefore, the complainant only narrated Tay's harassment of the complainant in the first police report (P4), without mentioning him hugging and holding her breast. Later, the complainant made a second report with more details of the incident. The learned sessions judge found that the complainant was still affected by the trauma of the incident, and considering this fact, the difference in evidence between the first police report and the complainant's evidence in court was immaterial and did not undermine the prosecution's case, nor did it make the main witness, SP1, an unreliable witness.

[20] Based on all of the above, the learned sessions judge found that the prosecution had succeeded in proving a prima facie case.

THE DEFENCE CASE

[21] Tay testified under oath and denied that he had outraged Ms Yeap's modesty. He stated that Ms Yeap and Nur Fazlin had conspired to falsely accuse him of having grabbed Ms Yeap's hand, breast and buttock. He admitted going to Ms Yeap's shop on 15 July 2015 at about 9.30pm but his version of events was as follows:

(a) he went to Ms Yeap's shop with some cookies and a greeting card with a message from Ah Kee. As soon as he arrived at the shop, he spoke to Nur Fazlin (SP5) and asked for Ms Yeap. After having ascertained that Ms Yeap was in the kitchen, he asked Nur Fazlin permission and went to the back where he found the complainant in the shop kitchen. Tay then handed the cookies and greeting card to Ms Yeap with both hands and Ms Tay had received them with both her hands calmly and with a smile.

A According to Tay, when he reached out his hands had touched Ms Yeap's palm. Tay stated that Ms Yeap's allegations of shouting, deliberately holding her hand, squeezing her chest, squeezing her buttocks are false, purely fabricated by the complainant;

B (b) after that, he said he walked out normally from the kitchen. Nur Fazlin entered and saw him hand over the items to the complainant. He said that the claim by SP5 that she heard the complainant scream;

(c) saw him leaving in a hurry is false, and a mere fabrication;

C (d) he further denied ever threatening to burn down the complainant's shop;

(e) he said the CCTV in the shop was working when he was in the shop on 15 July 2015; and

D (f) as for the incident on 11 August 2015, he stated that he had run into the complainant's father and had asked for compensation for having been punched by the complainant's father.

E **[22]** Tay also called SD2, Insp Zamzuri, to corroborate his version that that the complainant's father had punched him. He further stated that the allegation that he molested the complainant are false and defamatory and that Nur Fazlin had conspired with the complainant to falsely implicate him.

F FINDINGS AT END OF DEFENCE CASE

[23] After examining all the available evidence, the learned trial judge found that the defence was merely an empty denial that is not supported by any other witnesses or facts. The sessions court found the defence version to be incredible as it was raised for the first time during the defence case. This version of the G defence was never put or suggested to the prosecution's witnesses during the prosecution's case and was merely an afterthought.

[24] Hence, in the overall, the learned sessions judge concluded that Tay had H failed to cast any reasonable doubt on the prosecution's case. Therefore, he was convicted as charged.

SENTENCE

I **[25]** The following mitigating factors were submitted by learned counsel for Tay:

(a) Tay, aged 48, used to practice as an advocate and solicitor from 1994 till 2014, and was at the material time working as a legal advisor. He was married with two children, and the sole breadwinner of the family.

When in legal practice, he was once the Chairman of the Kelantan State Bar Disciplinary Panel. He was also in one of the sub-committees of the Kelantan Golf and Country Club. He was also involved in several NGOs and charitable bodies. The defence asked for a sentence of fine only.

(b) the prosecution sought a custodial deterrent sentence based on the following aggravating factors:

(i) it is a serious offence;

(ii) need to take into account the public interest and not only the interest of the accused;

(iii) the victim is traumatized;

(iv) Tay had defamed the victim;

(v) such incidents are becoming more prevalent;

(vi) after the incident, Tay was still harassing the victim; and

(vii) Tay as a lawyer should know that outraging modesty is a serious offence.

[26] Based on the facts and circumstances of the case, the learned trial judge was of the view that punishment in the form of a fine was not appropriate. The learned sessions judge was of the view that a custodial sentence was warranted as deterrence to other potential offenders. Having considered the mitigating and aggravating factors, the sessions judge sentenced Tay to three years imprisonment from the date of sentencing, ie 22 February 2017.

AT THE HIGH COURT

[27] Tay filed an appeal to the High Court against the conviction and sentence, whilst the public prosecutor filed a cross-appeal against the sentence.

[28] The learned High Court judge agreed with the sessions court's findings that the complainant was a credible witness. The complainant gave reliable evidence as to what had happened before and after the incident on 15 July 2015. The complainant was convincing in her testimony that Tay was the one who molested her. The learned High Court judge concurred with the sessions court's finding on the complainant's credibility as seen through her demeanour, as well as the quality of her evidence which was strong, probable, rational and consistent.

[29] The High Court found that the elements of the charge under s 254 of the Penal Code had been successfully proven by the complainant's evidence

alone. However, as a matter of prudence, the learned High Court judge agreed with the sessions court that there was strong corroborative evidence in the form of testimony from SP5. The High Court found that SP5's testimony was consistent with the complainant's testimony and supported each other. SP5's testimony also never wavered during cross-examination. In this regard, the High Court agreed with the sessions court that SP5 was a credible witness because there was no reason for her to fabricate a story and there was no reason for the court not to believe her.

[30] The next supporting evidence are the police reports P4 and P5 lodged by the complainant. The High Court found the complainant's testimony to be consistent with her police reports. As for the discrepancy in the date mentioned in P4, the learned High Court judge referred to the case of *Public Prosecutor v Datuk Hj Harun bin Hj Idris & Ors* [1977] 1 MLJ 180 where the Federal Court ruled that 'any contradictions and inconsistencies in the police report can be corrected by this witness during his examination in chief …'. This was done Ms Yeap during her testimony.

[31] The High Court also found that the complainant's actions in making the police reports P4 and P5 were relevant under s 8 of the Evidence Act 1950 because it showed the complainant's conduct after the incident. And this goes towards establishing the fact that the incident did take place and further showed the complainant's state of mind.

[32] Tay's conduct in coming several times to the shop prior to the incident to make observation and preparation was also relevant and Tay had taken advantage of the complainant who was hiding in a small store room and took the opportunity to hug and grab Ms Yeap's breast and buttock. The conduct of the complainant's father who had punched Tay is also relevant because the complainant's father would not have done so if the incident had not happened. SP6 also confirmed that Tay met with the complainant's father to resolve this matter between them but the complainant's father did not agree.

[33] Overall, the High Court agreed with the sessions court's findings that the prosecution had succeeded in proving a prima facie case. And that the defence case was merely an empty denial and not supported by supporting evidence. The High Court found that Tay's testimony was contradictory to the complainant's testimony. And unlike Tay's testimony, the complainant's evidence was corroborated by an abundance of supporting evidence.

THE ISSUE OF THE DATE OF THE OFFENCE IN THE CHARGE

[34] The defence contended that the sessions court had wrongly convicted Tay on a charge which states the date of offence as 13 July 2015, whilst the

evidence led by the prosecution was that the offence was committed on 15 July 2015. The learned High Court judge found from the notes of proceedings that in the course of the trial, the learned deputy public prosecutor had applied to amend the date of the offence stated in the charge from 13 July 2015 to 15 July 2015. The amended charge was then read and explained to Tay, and he pleaded not guilty. And after that, the learned sessions judge continued the trial by calling SP5. This was indicative of the fact that the sessions court had allowed the amendment to the charge. Hence, the learned High Court judge found this issue to be a non-starter.

THE ISSUE OF INCOMPLETE SESSIONS COURT CRT RECORDING

[35] Tay's solicitors had requested to be provided with the CRT recording of proceedings in the sessions court. However, due to technical problems, only the CRT recording of the defence case was available. The Registrar of the sessions court had called the IT contractor to retrieve the full CRT recording but also to no avail.

[36] Learned counsel for Tay submitted that the unavailability of the full CRT recording means that the High Court would not be able to see for itself the demeanour of the prosecution witnesses as well as the alleged interference of the learned sessions judge when Tay's counsel was cross-examining the prosecution witnesses.

[37] The High Court found that the issue of the absence of the full CRT recording had no merit. The CRT recording system was introduced in the courts in phases from 1 May 2009 onwards, but it did not replace the use of conventional evidence recording as stipulated in ss 266 and 267 of the Criminal Procedure Code. And in this case the learned sessions judge had taken comprehensive long hand notes of proceedings in accordance to ss 266 and 267 of the Criminal Procedure Code. Further, the case for the prosecution did not hinge solely on the demeanour of witnesses but on the strength of the overall evidence. Therefore, the High Court concluded that the absence of the complete CRT recording does not render a conviction invalid or void.

ISSUE — ABSENCE OF CCTV RECORDING

[38] Just as in the sessions court, learned counsel raised the issue of the non-existent CCTV recording at the shop where the incident took place. The High Court rejected this argument as it was devoid of any merit.

ISSUE — ALLEGATION THAT SESSIONS JUDGE INTERFERED IN THE CROSS-EXAMINATION OF THE COMPLAINANT

[39] After examining the notes of proceedings, the learned High Court judge rejected this argument because the sessions court judge had only disallowed questions on issues where uncontroverted evidence was already there. This did not cause any unfairness to the accused.

HIGH COURT'S CONCLUSION

[40] Hence, the High Court found that the conviction by the sessions court was safe and accordingly dismissed the appeal against conviction.

APPEAL AGAINST SENTENCE

[41] The High Court allowed Tay's appeal against sentence based on the following:

(a) Tay was a first offender;

(b) he was under stress because his wife was suffering from cancer;

(c) imprisonment of three years imposed by the sessions court will bring a crushing effect to Tay. Tay who has been remanded for seven days had repented before being released on bail;

(d) Tay was the family bread winner who had three dependents, namely two small children and a wife who was a housewife;

(e) the long prison sentence imposed by the sessions court will have an economic impact on the family and will separate Tay from his children;

(f) his wife also needs to get intensive treatment and Tay was the primary caregiver; and

(g) the wife's cancer had advanced, necessitating frequent visits to the hospital and he needs to take his wife to the hospital more often. If Tay is in prison for a long time, no one will take his wife to the hospital.

[42] The High Court was of the view that the sessions court had failed to give due consideration to these facts, thus justifying appellate intervention to reduce the sentence.

THE APPEAL BEFORE THIS COURT

[43] The issues raised before this court were similar to those raised at the High Court. At the outset it is worth noting that both the sessions court and High Court made concurrent findings of fact, and it is well established

principle that in such circumstance an appellate court should be slow to disturb these findings unless it is shown that the evidence does not support such findings. This was made clear by the Federal Court in *Public Prosecutor v Munusamy* [1979] 2 MLJ 286; [1980] 1 LNS 63 in the following words:

> Where there have been concurrent findings of fact in the lower courts it should not be made the practice in the appeal court to review these concurrent findings of fact unless it is shown that there was no evidence to support the inferences drawn in the lower courts.

[44] This principle was reiterated by the Federal Court in *Puganeswaran a/l Ganesan & Ors v Public Prosecutor and other appeals* [2020] 12 MLJ 165, where the court noted that where crucially the concurrent findings involve the question of the credibility of the witnesses, the appellate court should not interfere unless it is convinced that such findings were patently wrong. In this regard the Federal Court had referred to the Privy Council's decision in *Antonio Dias Caldeira v Frederick Augustus Gray* [1936] 1 MLJ 110; [1934] 1 LNS 5 and held as follows:

> ... the functions of an appellate court, when dealing with a question of fact, and a question of fact in which questions of credibility are involved, are limited in their character and scope, and that in an appeal from the decision of a trial judge based on his opinion of the trustworthiness of witnesses whom he has seen, an appellate court must in order to reverse, not merely entertain doubts whether the decision below is right but be convinced that it is wrong. See also *Chow Yee Wah & Anor v Choo Ah Pat* [1978] 2 MLJ 41b (PC); *Samar bt Mansor v Mustafa Kamarul Arifin* [1974] 2 MLJ 71.

[45] Further, in *Samar bt Mansor v Mustafa Kamarul Arifin* [1974] 2 MLJ 71, Raja Azlan Shah FCJ (as HRH then was) in answering the question whether an appellate court should substitute its own views of the facts for that of the trial judge had this to say:

> For an appellant to succeed in an appeal against a finding of fact made by a single judge, he must convince the appellate court that the learned judge was wrong in his conclusion. That the appeal is by way of rehearing does not alter the situation. A rehearing is not however a retrial of the issues. The question is not whether an appellate court can substitute its views of the facts which of course it is empowered to do so, but whether it should do so. However such an appellate court may be in an equal position with the trial judge as to the drawing of inferences, it ought not to reverse the finding of fact unless it is convinced that it is wrong. It is not whether the inferences are right but whether an appellate court is convinced that they are wrong. If that finding is a view reasonably open on the evidence, it is not enough to warrant its reversal just because an appellate court would have come to a different view. Merely differing views do not establish that either view is wrong, but in balancing these two views an appellate court should give due weight to the nature of the facts as found by the trial judge.

A **[46]** Now, counsel for Tay had submitted at length that the concurrent findings of the trial judge and the High Court judge that the prosecution had established a prima facie case were wrong. The concurrent findings on the credibility of Ms Yeap and SP5 were also challenged. It was submitted that both these witnesses were not credible. However, we have noted that it has not been B shown that the concurrent findings of fact by the courts below are unsupported by the evidence, direct or circumstantial. Of crucial importance to note in this regard is that the concurrent findings involve the question of the credibility of the witnesses, namely SP1 and SP5, and we do not find any cogent reason to disagree with the trial judge's finding on the credibility of these two important C witnesses. Their evidence was largely consistent and supported each other.

[47] The issue of the date in the charge was raised once again before this court. We did not find any merit in this issue. The charge originally stated that D the offence was committed on 13 July 2017 and this was subsequently amended to 15 July 2017 and the amended charge was then read and explained to Tay, and he pleaded not guilty, following which the trial continued. Ms Yeap explained why she had stated the wrong date in her first police report and that explanation was accepted by the sessions court. The High Court judge also E found the explanation to be plausible and reasonable. In any event Tay is not prejudiced by this change in date, he did not deny being in Ms Yeap's shop on 15 July 2017. He also did not deny going into the kitchen side of the shop and into the store where Ms Yeap was hiding. His defence was that though he was there, he did not indecently assault Ms Yeap by caressing her breast and F touching her buttocks, nor that he used criminal force on her.

[48] Learned counsel for Tay also raised the issue of the non-production of the CCTV recording. We did not find any error in the decision of the High Court in rejecting this argument. The evidence of the investigating officer G (SP6) was that the CCTV recorder was not functioning and as such there was no CCTV recording available to be produced in court. In any event, the production of the CCTV recording of the goings on in the shop front, even if it was available, was not going to help Tay as the offence was said to have been committed in the store at the kitchen, and not in front of any CCTV camera.

H

[49] Now, as for the incomplete CRT recording, learned counsel for Tay submitted at length. This issue was also considered in depth by the learned High Court judge. The High Court judge was satisfied that there was a genuine technical fault resulting in the system not capturing and storing the I audio-video data of the proceedings during the prosecution stage. Nevertheless, the High Court found the manual notes of proceedings recorded in long hand by the learned sessions court judge to be sufficient and in conformity with the requirements of the Criminal Procedure Code. In the circumstance, we do not find any miscarriage of justice. We agree with the

reasons given by the learned High Court judge that the failure of the CRT system to record the entire trial proceeding did not render the trial a nullity in order for a retrial to be ordered.

[50] We are in the overall satisfied that the High Court was right in affirming the decision of the sessions court to find the appellant, Tay, guilty of the offence charged. There was sufficient judicial appreciation of the evidence by the learned trial judge and she had not misdirected herself either on the facts or on the law. Hence, we found that the conviction was safe and accordingly dismissed the appeal against conviction as in Appeal No 504.

[51] As for the cross-appeal on sentence by the public prosecutor, we were of the considered view that the sentence imposed by the High Court was manifestly low. Considering the seriousness of the offence and the impact on the victim, Ms Yeap, and further taking into consideration the sentencing trend for an offence under s 354 of the Penal Code, a sentence of three months imprisonment was manifestly inadequate. The learned deputy public prosecutor argued for the sentence of three years imprisonment imposed by the sessions court be reinstated. However, we did not agree with that argument and were of the view that a more appropriate sentence would be imprisonment for a year whilst maintaining the fine of RM8,000 with eight months imprisonment in default of payment. Hence, we allowed the public prosecutor's cross-appeal and set aside the sentence of imprisonment of three months imposed by the High Court and substituted it with imprisonment of one year and affirmed the fine of RM8,000 in default eight months imprisonment.

Orders accordingly.

Order accordingly.

Reported by Dzulqarnain Ab Fatar